IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

against

BANCO NACIONAL DE CUBA,

Respondent.

REPLY BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY HARFIELD,
Attorney for Petitioner
53 Wall Street
New York, N. Y. 10005

SHEARMAN & STERLING
HERMAN E. COMPTER
JAMES B. KEENAN
Of Counsel

TABLE OF AUTHORITIES

Cases: PAGE

Anglo-Iranian Oil Co. Ltd. v. *S.U.P.O.R. (The Miriella)*, Italy, Court of Venice (1955) Int'l L. Rep. 19 ..... 6, 7

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956 (1968) 4, 10

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1963) 7, 8, 12

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 4

Banco Nacional de Cuba v. *Sabbatino*, 27 F.R.D. 255 (S.D.N.Y. 1961) 15

National City Bank v. *Republic of China*, 348 U.S. 356 (1955) 8, 9, 13

Pons v. *Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960 (1962) ... 13

Royal Holland Lloyd v. *United States*, 73 C. Cl. 722 (1932) 5

S.S. Lotus, P.C.I.J. ser. A, No. 10 (1927), 22 Am. J. Int'l L. 8 (1928) 3

Schoenbaum v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *reh. en banc* 405 F.2d 215, *cert. den. sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969) 3

State of Russia v. *Bankers Trust Co.*, 4 F. Supp. 417 (S.D.N.Y. 1933), *aff'd sub. nom. United States* v. *National City Bank*, 83 F.2d 236 (2d Cir. 1936), *cert. den.* 299 U.S. 563 9

United Kingdom v. *Iran*, I.C.J. Rep. (1952) 92 .. 6

United States v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945) 3

United States v. *Belmont*, 301 U.S. 324 (1937) .. 13

Statutes: PAGE

Bankruptcy Act, § 68, 11 U.S.C. § 108 11

Cuban Law of Nationalization No. 851 4,7

Cuban Law No. 891 15

Foreign Assistance Act of 1961, as amended,
22 U.S.C. § 2370(e)(1) 3,7
22 U.S.C. § 2370(e)(2) 3, 7, 10, 11

Fundamental Law of Cuba, Article 24 4,7

International Claims Settlement Act of 1949, as amended,
22 U.S.C. § 1643 .....10, 11
22 U.S.C. § 1643b 11
22 U.S.C. § 1643e 11
22 U.S.C. § 1643j 11

United States Constitution:

Article 1, § 8, cl. 3 3
§ 8, cl. 10 3
§ 8, cl. 18 3

Amendment V..... 7

Amendment XIV 7

Miscellaneous:

Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply,* 54 Am. J. Int'l 801, 808 (1960) 5

1940 For. Rel., Vol. V, pp. 1020-21 6

Hackworth, *Digest of International Law,* Vol. III, pp. 652, 656 4

Hazard, *Renewed Emphasis on a Socialist International Law,* 65 Am. J. Int'l L. 142 (1971) ... 6

PAGE

New York Times, January 20, 1972, p. 1, col. 1 .. 2

Note, 42 N.Y.U. J. Int'l L. & Pol. 260, 273 (Summer, 1971) 11

Restatement, 2nd, *Foreign Relations Law of the United States,* § 18 (1965) 3

Restatement, 2nd, *Conflict of Laws,* § 6(2)(b) ... 8

Sen. Rep. No. 701, 89th Cong. 1st Sess. pp. 3, 5 ... 11

White House Press Release, January 19, 1972, "Policy Statement: Economic Assistance and Investment Security in Developing Nations" 2

Whiteman, *Digest of International Law* (1968),

Volume 6, pages 1-54 7

Volume 8, pages 1053-1057 7

Volume 8, pages 1085-1136 6

Volume 8, pages 1095-1096 7

Volume 8, pages 1101-1105 6

Volume 8, pages 1170-1178 7

Wortley, *Expropriation in Public International Law,* 33-36, 152-153 (1959) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

Petitioner,

against

BANCO NACIONAL DE CUBA,

Respondent.

REPLY BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The ultimate issue presented by this case is whether a foreign state should be permitted to come into our courts as a suitor and secure relief on better or different terms than those available to an American litigant in the same court. The Cuban Government[1] has come into our courts demanding a money judgment against petitioner. That relief would not be available to an American litigant because petitioner's claim would offset, and thus extinguish, respondent's claim. Respondent does not deny that it took and holds petitioner's property; it asks "what a

---

[1] "[T]he Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (A.37). Respondent's persistent assertions that Banco Nacional is not responsible for the debts of Cuba and that it is "suing in its own right" are not relevant nor consistent with the record facts. *Cf. infra* pp. 14-17.

United States municipal court can do about it." (Brief for Respondent herein, "Resp. Br" p. 38).

Two questions are presented to this Court: (1) is a United States national, whose property has been confiscated by a foreign government, lawfully entitled to compensation for that property; and (2) in the circumstances of this case, does the act of state doctrine preclude the court from recognizing the validity of petitioner's claim?

1. *Petitioner is lawfully entitled to the offset claimed by it.* Petitioner's position is that its right to compensation flows from United States law, Cuban law, and international law (Brief for Petitioner herein, "Pet. Br." pp. 16-22). The President has recently stated the applicable United States policy in unmistakable terms.[2] What the New York Times called the "key passage"[3] declared:

> Under international law, the United States has a right to expect:
>
> —That any taking of American private property will be non-discriminatory;
>
> —That it will be for a public purpose; and
>
> —That its citizens will receive prompt, adequate, and effective compensation from the expropriating country.

That statement is a reaffirmation of the long-standing policy of the United States and is fully in accord with the authorities cited in our main brief.[4] It is declarative of the law of the United States, as expressed by Congress in

---

[2] White House Press Release, January 19, 1972, entitled "Policy Statement: Economic Assistance and Investment Security in Developing Nations."

[3] The New York Times, January 20, 1972, p. 1, col. 1.

[4] Pet. Br. pp. 18-21.

the Foreign Assistance Act of 1961, as amended,[5] which defines an expropriating country's obligations under international law, specifying that these obligations include speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof. The statute, as amplified by the Hickenlooper Amendment[6] is a "rule of compensation legislatively announced by Congress . . ." (A. 41). Judge Bryan aptly said, "This Court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here."[7]

The United States rule of law is "fully consistent with generally accepted principles of international law" (A. 41). Respondent, however, asks this Court to hold that there is no principle of international law that imposes any restrictions or consequences on a sovereign state which chooses to confiscate the property of aliens. To that end, respondent introduces an unsupported and insupportable premise, namely, that no rule can be treated as a principle of international law unless it is unanimously accepted by

---

[5] 22 U.S.C. § 2370(e)(1). The Constitution gives Congress the power to "define . . . Offences against the Law of Nations", Art. 1, § 8, cl. 10, and to "regulate Commerce with foreign Nations", § 8, cl. 3; *cf.* § 8, cl. 18. Congress clearly has power to attach legal consequences to acts occurring abroad which affect United States interests. *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *reh. en banc* 405 F.2d 215, *cert. den. sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906 (1969). This power is in accord with international law. *S.S. Lotus*, P.C.I.J. ser. A, No. 10 (1927), 22 Am. J. Int'l L. 8 (1928); Restatement, 2nd, *Foreign Relations Law of the United States*, § 18 (1965).

[6] 22 U.S.C. § 2370(e)(2).

[7] (A. 41). The court of appeals believed that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), did not lift the procedural bar of the act of state doctrine in this case, but it did not disturb or question Judge Bryan's finding that the first part of that statute, 22 U.S.C. § 2370(e)(1), is a substantive rule of general application.

all nations each time it is asserted, and that when any nation elects to change its own practice, it is no longer bound by the practice of nations (Resp. Br. Pt. VII, Appendix). This contention, of course, is the antithesis of the United States view: "nor can we admit that any government, unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law. . ." Hackworth, *Digest of International Law*, Vol. III, p. 652, at 656.[8]

There can be no doubt that "international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property." (A.40) The United States' point of view is considerably more than "parochial". The Second Circuit has stated that "it appears that most of the writers on the subject have asserted that just compensation for government taking is a requirement of international law." *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 863 (2d Cir. 1962), *r.o.g.* 376 U.S. 398 (1963); *accord, Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 183 (2d Cir. 1967), *cert. den.*, 390 U.S. 956 (1968).[9]

---

[8] Respondent's contention that the Cuban view of international law is that no compensation need be paid for nationalized property is flatly contradicted by Article 24 of the Fundamental Law of Cuba (Pet. Br., p. 6a) and the lip-service given to the principle of compensation in the nationalization statute itself (*id.*, p. 2a). In the light of these Cuban statutes, respondent is less than candid in its assertions that "Petitioner provides no hint as to the basis for the right of compensation on which it relies" (Resp. Br., p. 24) and that "Petitioner has not argued that it is entitled to recovery under Cuban law" (Resp. Br., p. 25, but see Pet. Br., p. 19 and Petition for Writ of Certiorari, pp. 14-15). Respondent's argument really comes down to this: that by failing to meet the dictates of its own law and by violating the principles it has professed and solemnly proclaimed, Cuba has made those principles disappear.

[9] *See* 307 F.2d, 863, n. 12 for a listing of other authorities on the subject, considered by the Second Circuit but not included in respondent's list at Resp. Br. p. 41, n. 22, and 307 F.2d, 863, n. 11 for a listing of ten cases predicated upon the proposition that compensation is due for government taking. Our own courts have

(*footnote continued on following page*)

Authorities on international law have examined self-serving nationalistic views on non-responsibility to compensate foreigners, and found such views neither in accord with the obligations imposed by international law on national conduct nor in accord with general national practice, even after 1917 (the date selected by respondent):

> Neither municipal legislation as such nor any absence of uniformity in it provides a necessary basis for a rule of public international law. When a writer says that 'States when engaged in reforms of their social and economic structure deny the existence of a duty to compensate' [S. Friedman, *Expropriation in International Law,* London, 1953, pp. 207, 221], he is merely referring to the statements made by the French, Mexican and Russian Revolutionary Governments to justify revolutionary seizures, whereas, in fact, at different times, as the same writer himself shows, France, Russia and Mexico have found it expedient to make some measure of compensation for property so seized, even though it may have been expressed to be *ex gratia*. . . . The varying practice of States is not a conclusive argument as to legal rights in international law. (Wortley, *Expropriation in Public International Law* (1959), 152-153.)

Thus, while the Mexican view regarding the 1938 expropriations is described by respondent as the opposite of that of the United States (Resp. Br. p. 40) (although Mexico took the position that it *did* respect

---

(*footnote continued from previous page*)

held the United States itself responsible for damage claims under international law even where United States local law provided no remedy. *Royal Holland Lloyd* v. *United States,* 73 C. Cl. 722 (1932). See also Wortley, *Expropriation in Public International Law,* 33-36 (1959) for a list (which Professor Wortley characterizes as "not exhaustive") of some thirty authorities in various countries, holding the view that compensation is required. That this is the "prevailing view", is indicated in Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply,* 54 Am. J. Int'l. 801, 808 (1960). It can hardly be said that the authorities are in "sharp conflict" (Resp. Br. p. 41).

"the principle of compensation" although not "immediate compensation", 1940 For. Rel., vol. V, pp. 1020, 21, 26), Mexico did in fact pay Sinclair Oil Company alone $13,500,000 for its property in 1940, and made a general settlement with the United States in 1942 for $23,995,991 in respect of various claims. *See* 8 Whiteman, *Digest of International Law,* 1101-05. Whiteman also collects the details of the agreements of China (Republic), Denmark, Germany (F.R.), Greece, Ireland, Israel, Italy, Japan, Korea, Netherlands, Nicaragua, Pakistan, Belgium, Luxembourg, Ethiopia, Viet-Nam, Iran, Muscat and Oman and France that just compensation is due for the taking of foreign property, and records agreements to pay compensation, and payment, by Brazil, Mexico, United Arab Republic, Soviet Union, Hungary, Rumania, Bulgaria, Yugoslavia, Czechoslovakia and Poland through the end of the 1960's in considerably more detail than that sketched in respondent's Appendix. 8 Whiteman, *supra,* pp. 1085-1136. It is noteworthy that the Communist countries generally have agreed to compensate foreign interests although from their beginning they have repudiated the applicability of international law to them. Hazard, *Renewed Emphasis on a Socialist International Law,* 65 Am. J. Int'l L. 142 (1971). Perhaps maturity teaches the wisdom of compliance with a rule such as that of compensation, which is for the ultimate mutual benefit of all adherents to the rule, particularly for those desiring to attract foreign investment and international trade.

In its brief, respondent undertook to prove that the United States' view is wrong. It has failed to do so.[10] The

---

[10] In reference to respondent's version of the Indonesian Nationalization cases (Resp. Br. p. 44, n. 24), we point out that in the Rome litigation (as in the I.C.J. litigation: Anglo-Iranian Oil Co. Case (*United Kingdom* v. *Iran*), I.C.J. Rep. (1952) 92), the issue was discrimination against Anglo-Iranian, not whether compensation had been paid or offered. (*Cf.* Judge Carniero's dissenting opinion in the I.C.J. case, at pp. 151, 159-60, 162 for a cogent statement of the rationale of the compensation rule.) Indeed, in the Venice litigation, *Anglo-Iranian Oil Co. Ltd.* v. *S.U.P.O.R.*

(*footnote continued on following page*)

plain fact is that our courts are in accord with the Executive and the Congress in finding that there are principles of international law, and, in appropriate cases, in disregarding foreign law violating those principles, even though that foreign law might otherwise apply under choice-of-law rules.

As we pointed out in our main brief, every court in the United States that has had occasion to examine Cuban Law of Nationalization No. 851 has found that the seizures of the property of United States nationals pursuant to that law were in violation of international law (Pet. Br. p. 17). This statement is not challenged by respondent.

Respondent's suggestion (Resp. Br. p. 25) that "a most elementary rule of conflicts" requires that the validity of petitioner's claim be governed solely by Cuban law and not be United States law must be rejected in the circumstances of this case. Initially, since both Cuban Law (p. 4, n. 8, *supra*) and United States law provide for compensation there would appear to be no "conflict" of laws, so no "choice" of law is necessary. Even so, in the ordinary choice-of-law case, where the forum must determine which of divergent state laws governs the rights of private liti-

---

(*footnote continued from previous page*)

(*The Miriella*), Italy, Court of Venice (1955) Int'l. L. Rep. 19, 20, 23, the Court noted that Mr. Mossadegh, then head of the Persian Government, had himself offered compensation to Anglo-Iranian, and confirmed his obligation to pay before the International Court of Justice. The High Court of Tokyo, in reviewing the Tokyo District Court decision cited by respondent, indicated that it did not pass on the validity *or invalidity* of the nationalization law despite the alleged failure to compensate because "we do not think these matters are contrary to the public policy of this country [Japan]." This statement should be contrasted with the public policy of the United States as expressed in the Fifth and Fourteenth Amendments and in the Foreign Assistance Act of 1964 as amended. See, generally, 6 Whiteman, *Digest of International Law*, 1-54; 8 Whiteman, *Digest of International Law*, 1053-1057, 1170-1178, 1095, 1096. Justice White lists other examples of judicial examination of foreign acts of state at 376 U.S., 440, n. 1.

gants, the court's determination is aided by ascertaining and evaluating the importance of the public policy of the forum. Restatement, 2nd, *Conflict of Laws*, §6(2)(b).[11] In this case the respondent asserts that it is the sole exponent of Cuban law, that such law does not provide for compensation, and that this Court must, without examination, apply whatever rule respondent may, from time to time, designate as Cuban law. Respondent, in short, would deny the existence of any choice of law and insist that its version of Cuban law must be applied by this Court even though to do so would derogate from the public policy of the United States and be contrary to what the Legislative and Executive branches of our Government have declared to be the national interest. In these circumstances, the application of respondent's version of a "most elementary rule of conflicts" would be highly inappropriate. Rather, the respondent's election to seek American law for enforcement of its claim should, as in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), be deemed an acquiescence in the application of American law to petitioner's counterclaim.

Moreover, under the most elementary rules of procedure, respondent has failed to support its assertions as to Cuban law. Petitioner pleaded and proved (A.20-21, 23-24) that Cuban law guarantees it compensation for its seized properties and that under Cuban law the Republic of Cuba is indebted to petitioner in an amount substantially in excess of the amount claimed in the complaint. Upon such pleading and proof, the burden shifted to respondent to come forward with proof (not the assertions of counsel) that Cuban law was not as pleaded and *prima facie* proved by petitioner. This respondent has failed to do and, upon

---

[11] Justice White has observed that "American courts have denied recognition or effect to foreign law, otherwise applicable under the conflict of laws rules of the forum, to many foreign laws where these laws are deeply inconsistent with the policy of the forum, notwithstanding that these laws were of obvious political and social importance to the acting country." 376 U.S., 447 (dissenting opinion).

the record in this case, petitioner's counterclaim must be deemed valid under Cuban law, as well as under international law and our law.

The dollar amount of the counterclaim is established by stipulation.[12] Accordingly, respondent's exaggerated concern with the difficulty of fixing the amount when compensation is found to be due has no place in this case; and its elaborately contrived appendix is equally irrelevant. (Resp. Br. pp. 42, 47-57).

2. *The act of state doctrine does not require the Court to grant the relief demanded by the respondent when petitioner has legitimate defenses that would fairly curtail respondent's recovery.* The basic teaching of this Court in *Republic of China* is that a private litigant in our courts, in an action there instituted by a foreign state, is entitled to interpose such legitimate defenses or counterclaims as it may have, not in excess of the amount claimed in the complaint.[13]

The right to interpose a legitimate counterclaim is not, in the circumstances of this case, "an accident of pleading" (Resp. Br. p. 22). It is an essential element of the relationship between the parties. The only significance of the presentation of petitioner's claim as a defense or counterclaim, rather than as an initial pleading, is that under United States law, respondent's governmental immunity was waived by its institution of this lawsuit. Absent sovereign immunity (which respondent now seeks

---

[12] The stipulation provides that "if the defendant [petitioner] is lawfully entitled to the offset claimed by it, the amount thereof is such that plaintiff [respondent] will take nothing in this action" (A.4).

[13] *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); A.82-86; Memorandum for the United States as Amicus Curiae, p. 4. *See, State of Russia* v. *Bankers Trust Co.*, 4 F. Supp. 417 (S.D.N.Y. 1933), *aff'd sub nom. United States* v. *National City Bank*, 83 F.2d 236 (2d Cir. 1936), *cert. den.* 299 U.S. 563.

to reinstate under the guise of the act of state doctrine) petitioner might well have been the initial pleader, faced with an offset or counterclaim by respondent. The shape of the pleadings has nothing to do with the act of state doctrine nor with the validity of the counterclaim.

Congress has said that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law . . ." 22 U.S.C. § 2370(e) (2). Respondent assigns three reasons why this Court should disregard that plain mandate of Congress.

First, respondent argues that the statute is unconstitutional. That contention has been made before and has been rejected by the courts as often as made. *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.*, 390 U.S. 956 (1968). Secondly, the respondent argues that the mandate of the Hickenlooper Amendment should apply only to claims of title to tangible personal property then physically present in the United States, and not to intangible property owned by United States nationals. Our response to that argument is set forth on pages 11, 12 and 13 of our main brief.

Finally, respondent relies upon the "windfall" argument (Resp. Br. pp. 21-22) first suggested in a dictum of the court of appeals. That dictum, we submit, is without merit or substance. The Executive did not "freeze" Cuban assets until long after petitioners' offset had accrued and had been asserted in this action; and the adjudication of claims against Cuba under the International Claims Settlement Act did not establish a plan for the marshalling of Cuban assets and distribution to creditors.[14] Even

---

[14] The purpose of the Act is to provide for the determination of the amount and validity of U.S. claims against Cuba, 22 U.S.C. § 1643. There is no Congressional intent to vest Cuban property. The Senate Foreign Relations Committee struck from the Act

(*footnote continued on following page*)

if it had, the petitioner, by analogy to the bankruptcy laws, was entitled to the offset. *Cf.* Bankruptcy Act § 68, 11 U.S.C. § 108. Further, whether or not the determination by the Foreign Claims Settlement Commission is *res judicata,* the allowance of petitioner's claim, after deduction of the offset, is in accord with the policy of the U.S. Government the Commission was directed to administer, 22 U.S.C. §§ 1643, 1643b, 1643e; and it is entirely consistent with the factual basis of petitioner's claim, which has not been contested in this action. Moreover, *any* application of the Hickenlooper Amendment, even to specific tangible property such as sugar or tobacco, necessarily creates a preference for the particular victim of confiscation whose property happens to find its way back to the United States.

The prompt action of petitioner in exercising its offset produced a benefit, rather than a detriment, to unsecured general creditors of Cuba. No "freeze" was imposed on Cuban assets until some three years after the offset was taken. During that time the Castro Government effectively carried out a program of moving its assets (and those taken from its nationals), beyond the borders of the United States. Some $100 million of assets were thus transferred to Cuban accounts in Canada alone. Note, 42 N.Y.U. J.Int'l L. & Pol. 260, 273 (Summer 1971). If

---

(*footnote continued from previous page*)

§ 1643j(b), which provided for vesting, because of the objection of the Department of State that "to vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights." Sen. Rep. No. 701, 89th Cong. 1st Sess., p. 3. The Senate Committee also indicated that assets "wholly or substantially" owned by United States residents should not be blocked at all so no property of a United States citizen could be used to pay the claims of another United States citizen against Cuba. *Id.,* p. 5. It has been pointed out that the purpose of this Act is consistent with our reading of the purpose of the Hickenlooper Amendment, and not contrary to it. Note, 42 N.Y.U. J.Int'l L. & Pol. 260 (Summer, 1971).

petitioners had paid the surplus proceeds of collateral to respondent in 1960, without taking the offset, the money would have been lost both to the petitioner and to other creditors. By taking the offset, petitioner's claim has been ratably reduced, thus increasing the share of unsecured creditors in frozen assets actually available for distribution, if and when Congress adopts a policy for the disposition of such assets.

Respondent's objections to the legitimacy of petitioner's claim can hardly be taken seriously. The claim is for compensation expressly promised by Cuban law,[15] required by principles of international law,[16] and guaranteed by United States law.[17] To allow this claim as an offset against respondent's claim in this case does not call in question the validity of any sovereign act, nor does it reverse or in any way alter the effect of such act on status or property lying outside the jurisdiction of this Court.[18] The intent of Congress that the act of state doctrine should not be applied to bar this petitioner from its day in court is clear.[19] The Executive Branch has formally represented to this Court that the application of the act of state doctrine is not in the national interest, and that its application by a majority of the court below "seriously impairs the power of the Executive over the control of foreign affairs. . . ."[20]

---

[15] (A. 20); *cf.* Pet. Br. p. 19; note 8, *supra.*

[16] Pp. 2-7, *supra.*

[17] Pet. Br. pp. 18-20.

[18] The *Sabbatino* opinion was directed only to "the *validity* of a taking of property within its own territory by a foreign sovereign government" [emphasis added], not to the questions of indemnity or compensation due. 376 U.S., 428.

[19] (A. 39-45); Appendix G to Petition for Writ of Certiorari (70-295); *see* the authorities listed at p. 12, n. 5 of our main brief for an extensive listing of legislative history in support of this proposition.

[20] (A. 82-86); Memorandum for United States as Amicus Curiae, p. 2.

Respondent's argument that the Court *must* nevertheless apply the doctrine in this case is supported neither by authority[21] nor by reason.[22] On analysis, respondent's arguments are reduced to absurdities: that the independence of the Judicial branch requires abdication of the judicial function[23] and that the doctrine of separation of powers requires internecine confrontation between coordinate branches of our government.[24] In the light of the principles laid down by this Court in *Republic of China*, the Congressional declaration of accepted principles of international law as the law of the United States, and the

---

[21] See Pet. Br. p. 9. Respondent's reliance upon *Pons* v. *Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960 (1962) is misplaced and its statement of that case (Resp. Br. p. 9) is misleading. Pons was a Cuban national and an agent of the Cuban government, stationed in the United States. Cuba filed, in the District Court for the District of Columbia, a claim against Pons for $120,000. Pons responded by claiming that some $63,500 had been paid by him in discharge of a debt of Cuba; he deposited the balance ($56,454.72) in the Court's registry and asserted a counterclaim of $66,500, being the value of property in Cuba which he alleged the Cuban government had taken from him "without any legal justification and without due process of law". 294 F.2d 925, at 926. The District Court dismissed that counterclaim and the Court of Appeals affirmed, on the ground that what another country has done in the way of taking over property of its nationals is not a matter for judicial consideration in the United States. 294 F.2d at 926, citing *United States* v. *Belmont*, 301 U.S. 324, (1937), 332. The District Court left undecided Cuba's claim for the additional amount ($63,545.28) for which, in effect, Pons had successfully claimed an offset. In these circumstances, *Pons* provides no support for respondent's arguments as to the act of state doctrine and respondent's representation (Resp. Br. p. 14) that "the facts in the *Pons* case were the same as in the present case save the party in office has changed" is not correct.

[22] "[T]he majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve." A.87. (Hays, J.).

[23] *See* Resp. Br. pp. 8-15. *But see* Memorandum for United States as Amicus Curiae, pp. 2, 3; A.86, 87.

[24] Resp. Br. pp. 11, 12, 14, 15.

supervening and explicit statement of Executive policy, the act of state doctrine should not be applied to deprive petitioner of its legitimate counterclaim in this case.

3. *The District Court correctly found that the government of Cuba and Banco Nacional are one and the same for purposes of this litigation.* Respondent repeatedly asserts that Banco Nacional is not responsible for the debts of Cuba. Respondent also asserts in its Point VI that "respondent is suing in its own right". The first of these assertions is irrelevant and the second is contrary to the facts established in the record and found by the district court.

The suit was brought to recover surplus proceeds of collateral pledged for a loan made in 1958 in the initial principal amount of $15 million, which was, in 1960, reduced to $10 million by a payment of $5 million. The documentation for the loan gave the name of the borrower as Banco de Desarollo Economico y Social (hereinafter "Bandes") but the securities were pledged by Fondo de Establizacion de la Moneda (hereinafter "Fondo"). Both Bandes and Fondo were "institutions of the Republic of Cuba" (A. 12).

There is no dispute as to the events in connection with the seizure by Cuba of the Bank's eleven branches, nor as to the chronology of those events. The Bank's branches were seized on September 16, 1960 and were turned over to respondent, which is still in possession and control of those properties.[25] On September 23, 1960, the Bank, by cable, advised the respondent, which was the fiscal agent of Cuba in this transaction, that collateral held as security for the Bandes note had been sold, and the proceeds had been applied against principal and interest.[26] On October

---

[25] Second amended reply, par. 9 (A.30); Pet. Br. pp. 5, 3a; Cuban Executive Power Resolution No. 2 (Def. Mot. Exh. 22) (A.42, n. 6).

[26] Amended complaint, par. 8 (A.12).

13, 1960 Fondo was dissolved and the rights of Fondo in the collateral were transferred to the respondent by action of the Cuban Government.[27]

It is thus apparent that respondent claims as agent for or as the assignee and transferee of the Government of Cuba. The assertion now made in respondent's brief that Banco Nacional de Cuba is "suing in its own right" is nothing less than astounding, in light of its allegation in *Sabbatino* that it is a "public corporation wholly owned by the government" of Cuba[28] and the provisions of Cuban Law No. 891, dated October 14, 1960 (Def. Mot. Exh. 10) which declared:

> The banking function is hereby declared of public interest and, from this moment on, only the State shall be authorized to exercise it through the organizations created for that purpose . . .
>
> It is hereby ordered that the nationalization and subsequent assignment in favor of the Cuban State, ordered in the foregoing Article, be carried out through the National Bank of Cuba, as an autonomous organization in charge of directing the banking function of the State. Therefore, the National Bank of Cuba is hereby declared the legal successor, subrogated in place and stead of the individuals and juridical persons referred to in Article 2 of this Law, with respect to all property, rights and rights of action mentioned, and the entire assets and liabilities of the banking institution object of this Law are hereby transferred to the same National Bank.

---

[27] Amended complaint, par. 10 (A. 13).

[28] 27 F.R.D. 255, 258 (S.D.N.Y. 1961). The cases cited in Point V of respondent's brief are irrelevant where, as here, the public corporation sues on behalf of the government and the counterclaim is asserted against the government.

Respondent's arguments bear little resemblance to the facts as alleged in its amended complaint (A. 11-13). The complaint alleges that the United States Government securities, which were pledged to petitioner, were owned by Fondo. Fondo was an institution of the Republic of Cuba.[29] Respondent's role in the loan and pledge transaction was that of agent and not of principal. It is alleged in the amended complaint (A.11) that respondent was "authorized to administer the . . . foreign credit operations of the Republic of Cuba as its agent . . ."

Thus, at all times, from the inception of the transaction to the date when petitioner exercised its right of offset, the collateral pledged to petitioner belonged to the Republic of Cuba, was pledged by an institution of the Republic of Cuba engaged in the performance of governmental functions, and was at no time part of the "patrimony" of respondent as "an autonomous entity". The complaint goes on to allege that on or about October 13, 1960, the Cuban government dissolved Fondo and transferred to respondent all of Fondo's rights and obligations, presumably including such claims as the Cuban government had to the proceeds of its collateral pledged with petitioner. This lawsuit was not commenced until November 28, 1960, when the Cuban government had completed such cosmetic changes as it deemed necessary to put the best possible face on respondent's claims in this case.

Judge Bryan found, on ample evidence, that "any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional which "alone has exclusive charge of directing the banking function of the state." Indeed, the record compels the conclusion that the Cuban government's official

---

[29] In English translation, Fondo de Establizacion de la Moneda (Fondo) means "Monetary Stabilization Fund".

insistence upon the pretense that respondent is "an autonomous entity" is, at best, a transparent fiction, and, at worst, a deliberate imposture on the Court.

We respectfully submit, however, that this line of inquiry need not detain the Court because the record shows, without contradiction, that at all material times the pledged collateral and the claim for its proceeds was and is Cuban government property. The record fully establishes that "this action is brought by and for the benefit of the Republic of Cuba by and through its agent . . . which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba" (A. 17). As Banco Nacional is an agent and the Cuban government is a principal, it is not necessary to determine whether Banco Nacional has an independent corporate *persona*. The inevitable conclusion is that "the Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit" (A. 37, n. 3).

Respondent's argument that the Republic of Cuba is not "an opposing party" (Resp. Br. Pt. VI) may be summarily dismissed. Respondent sues here, in its capacity as a Cuban government instrumentality, to recover a sum of money allegedly due to the Cuban government. And it is in precisely that capacity that the counterclaim is asserted against it. Petitioner and the Cuban government are opposing parties. That fact should not be obscured because the Cuban government chooses to use an alias.

CONCLUSION

The judgment below should be reversed and the judgments of the District Court reinstated.

Respectfully submitted,

HENRY HARFIELD
Attorney for Petitioner
53 Wall Street
New York, N. Y. 10005

SHEARMAN & STERLING
HERMAN E. COMPTER
JAMES B. KEENAN
Of Counsel

February 8, 1972